NO. 82-1492

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HERITAGE PRODUCTS, INC., et al.,
Petitioner,

vs.

ED-LEE, INC., et al.,
Respondent.

On A Writ Of Certiorari To The
Supreme Court of Kentucky

PETITION FOR CERTIORARI

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(901) 755-1303
Attorney for Petitioners

Pan Media Associates, Memphis, TN 901-274-7788

QUESTIONS PRESENTED

1. The single question presented for review is whether the trial court has the discretion to destroy a person's cause of action no matter how remote the chances for recovery might be.

2. Is the action of the trial court in dismissing such a cause violative of the due process provisions of the Fourteenth Amendment to the Constitution of the United States?

PARTIES

The parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

Heritage Products, Inc.; Charles L. Ott; Sharon Ott.....Petitioners

Ed-Lee, Inc.; Mul's Inc.; H-S-H, Inc.; E. Lee Hasenour.....Respondents

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OCTOBER TERM, 1982

HERITAGE PRODUCTS, INC., et al.,
Petitioner,

vs.

ED-LEE, INC., et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioners, Heritage Products, Inc., Charles L. Ott and Sharon Ott, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kentucky entered in this case on December 7, 1982

OPINIONS BELOW

The judgment sought to be reviewed is that of the Supreme Court of Kentucky (82-SC-845-O)[1]

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[1] Heritage Appendix Exhibit D at A-18.

denying petitioners Motion for Discretionary Review of the decision of the Court of Appeals of Kentucky (82-CA-359-MR).[2] The Court of Appeals affirmed the judgment of the Jefferson Circuit Court, Ninth Circuit, overruling the motion of petitioners to set aside an agreed judgment. (80CI01967).[3]

JURISDICTION

The order of the Supreme Court of Kentucky denying petitioners Motion for Discretionary Review (No. 82-SC-845-D) was entered December 7, 1982; the decision of the Court of Appeals of Kentucky (82-CA-359-MR) affirming the decision of the Jefferson Circuit Court was entered at 10:00 a.m., September 24, 1982; the decision of the Jefferson Circuit Court, Ninth Circuit overruling the Motion to Set Aside the Final Judgment was entered October 28, 1981.

The jurisdiction of the Supreme Court of the United States is involved pursuant to 28 U.S.C. §1257(c).

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[2] Heritage Appendix Exhibit C at A-12.

[3] Heritage Appendix Exhibit B at A-5.

CONSTITUTIONAL PROVISIONS

This case involves Amendment XIV to the Constitution of the United States, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Amendment XIV (Section 1)[1868]
> Constitution of the United States of America

STATEMENT OF THE CASE

The respondents, Ed-Lee, Inc., Mul's, Inc. and H-S-H, Inc., filed a complaint on February 28, 1980, and an amended complaint on May 8, 1980. The petitioners, Heritage Products, Inc., Charles L. Ott and Sharon Ott filed an Answer on March 24, 1980, and an Answer to Amended Complaint and Counter-Claim on June 3, 1980.

The original complaint alleged that the petitioners defaulted on the payments of promissory notes worth a total of $100,000.00. The counter claim alleged that respondents had misrepresented the financial condition of the business which petitioners had purchased and therefore, the default was caused and brought about by the fraudulent misrepresentations of the respondents.

The case was called for trial on July 31, 1980. One of the petitioners, Sharon Ott, was out of the state, and therefore did not appear. At the hearing, an agreement was entered into by respondents and petitioner Charles Ott, disposing of all claims. Upon her return to that state, Sharon Ott refused to sign this agreement. Nevertheless, the agreement ws filed on August 19, 1980, in a form materially different from the original agreement, and lacking the necessary signature of Sharon Ott.

The petitioners subsequently filed a Motion for Relief and to Set Aside Final Judgment pursuant to K.R.C.P. 60.62 (a) (d) (f) and a sup-

porting affidavit, signed by petitioner Sharon Ott. This motion alleged that the judgment was entered fraudulently in that the signature of Sharon Ott was necessary and that the signature of Charles Ott was contingent upon his procuring the signature of Sharon Ott.

This motion was overruled by the Honorable Charles M. Leibson, of the Ninth Division of Jefferson Circuit Court in the Findings of Fact and Conclusions of law,[4] entered on October 28, 1981, effectively upholding the agreed judgment and dismissing Sharon Ott's counter claim. In this order, Judge Leibson made mention of the issue presented here – that Sharon Ott, by virtue of the agreed judgment, gave up a very slight possibility of recovery on a counter claim.[5]

The petitioner in February of 1982, filed an appeal brief with the Court of Appeals of Kentucky, contending tht Sharon Ott was deprived of continuing the action, as well as her counter claim.[6] The brief reiterated that Sharon Ott

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[4] Heritage Appendix A at A-1.

[5] Id. at A-4.

[6] Brief for appellant to the Court of Appeals of Kentucky sets this forth at p.11, p.14.

has been denied her day in court by the filing of the agreed judgment without her signature.[7]

The Court of Appeals of Kentucky affirmed the judgment of the Jefferson Circuit Court, yet failed to address the petitioners' contention that Sharon Ott was deprived of her day in court by the entering of the judgment without her signature.

This contention was further raised in petitioner's Motion for Discretionary Review to the Supreme Court of Kentucky, filed in October of 1982.[8] The Motion for Discretionary Review was denied in an Order from the Supreme Court of Kentucky, on December 7, 1982.

As is clear from the record, the federal question sought to be reviewed was raised in the trial court, in the Motion for Relief and to Set Aside Final Judgment, and summarily dismissed by the trial court. The question was again raised in the Brief for Appellant to the Court of Appeals of Kentucky, but was unaddressed in that Court's order.[9] A third time, in the Motion for Discretionary Review to the Kentucky Supreme Court, the question was raised, but the Court denied review of the decision of the Court of Appeals.

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[8] Motion for Discretionary Review of the Court of Appeals Decision in No. 82-CA-359-MR, pp. 4-5.

[9] Heritage Appendix Exhibit B at A-5.

REASONS FOR GRANTING THIS PETITION

This petition raises the issue of whether a person against whom an agreement is entered, is denied the due process of continuance of a claim and counter claim, when that judgment was entered without that person's authority, agreement or signature. Encompassing this question is the question of whether a trial court may sustain this agreement with full knowledge that the unsigned agreement would result in a premature end to the petitioners' cause of action, especially in light of the fact that the trial judge admits that the actions of the court will extinguish their right.

The citations are too numerous to mention them all, but many cases have held that litigants are entitled to access to the courts; to have a full and fair day in court. **Hopewell Tp. v. Volpe,** 446 F.2d 167 (C.A.NJ. 1971); **Branham v. Malone,** 367 F.Supp. 370, **affirmed** 497 F.2d 923 (D.C.Ky. 1973).

The Court in **United States v. Andrews,** 462 F.2d 914 (C.A.Mass. 1972), stated that a party's day in court should not have to begin in the Court of Appeals.

In **Turner v. State of Louisiana,** 379 U.S. 466 (1965), certiorari was granted by the United States Supreme Court to consider whether circumstances attending the defendant's state trial were such to deprive him of rights secured to him by the Fourteenth Amendment to the Constitution of the United States.

Petitioners contend that the same situation is present here. The act of the trial court in denying petitioners' Motion to Set Aside was affirmed by the Court of Appeals of Kentucky and denied review by the Kentucky Supreme Court. These actions served to hold Sharon Ott to an agreement which she never agreed to and led to the dismissal of the action and her subsequent counter claim. This petitioner has not been given her day in court, and the actions in denying her this opportunity, secured by the Fourteenth Amendment, should be subject to review by the Supreme Court of the United States under **Turner.**

CONCLUSION

For the reasons stated and incorporated by reference, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

HERITAGE PRODUCTS, INC.,
CHARLES L. OTT and SHARON OTT

By: _____

ASA H. HOKE
2136 Exeter Road, Suite 203
Germantown, Tennessee 38138

Attorney for Petitioners,
Heritage Products Inc.,
Charles L. Ott and Sharon Ott

CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition for a Writ of Certiorari to the Supreme Court of Kentucky on behalf of Heritage Products, Inc.; Charles L. Ott and Sharon Ott were served on this 18th day of March, 1983, on the following counsel of record by first class mail, postage prepaid:

Manley Feinberg
Attorney at Law
211 South Fifth Street
Louisville, Kentucky 40202

EXHIBIT A

JEFFERSON CIRCUIT COURT
NINTH DIVISION
NO. 80CI01967

ED-LEE, INC. PLAINTIFF

-VS-

HERITAGE PRODUCTS, INC.,
ET AL. DEFENDANTS

FINDINGS OF FACT & CONCLUSIONS OF LAW

Defendant, Sharon L. Ott, moves the Court to set aside final judgment against her entered August 19, 1980, citing KRCP 60.02, claiming the judgment was "entered fradulently, to the defendant's surprise," and filing an affidavit in support of such claim.

This Court conducted an evidentiary hearing regarding these claims on October 23, 1981. A transcript has been made of the evidence at this hearing.

Based on the evidence offered at the hearing, this Court finds as follows:

1) This case was called for trial on July 31, 1980. Mrs. Ott was notified of the hearing, and failed to attend. Instead, she went to Florida to await her husband, who did come to the trial, and joined here thereafter. If Mrs. Ott wished to present any testimony in her own defense, or testify in support of her alleged counterclaim, she was required to do so at that time.

2) Her lawyers at that hearing, Fred Simon and Stuart Yussman, had authority to represent her at that trial. A transcript of the hearing which is filed in the record shows that they appeared for Mrs. Ott and her husband, Charles Ott, and entered an agreement, which was intended to constitute an agreed judgment disposing of all claims, including those of Mrs. Ott. Although the parties contemplated that they would retire to an attorney's office and draw up a more detailed formal agreement, the agreement entered at the time of the trial, on the basis of which the plaintiff, Ed-Lee, Inc., etc., did not present its evidence, was a binding agreement subject to being reduced to judgment.

3) The judgment entered in this case August 19, 1980, insofar as it conforms to the agreements of the parties expressed in the transcript of the hearing of July 31, 1980, is binding and enforceable. It was subject to execution, as had subsequently occurred.

4) Defendant, Mrs. Ott, claims that the judgment varies from the agreement as expressed in the transcript with regard to that portion of the judgment expressed in paragraph 3(e) which states "she will not be given credit for any sums received as the result of the sale of the personal property located at 2009-2011 Brownsboro Road, Louisville, Ky., or 2531 S. Third St., Louisville, Ky."

The guarantee originally signed by Mrs. Ott, which was the subject matter of the suit against her, reasonably interpreted, was an obligation

to stand good for up to $30,000 of the $100,000 obligation her husband was undertaking. Obviously, this would mean any unpaid portion of her husband's obligation up to $30,000, which would necessarily include the last $30,000 unpaid. Since the amount as to which her hustand is in default exceeds $30,000 even after any conceivable credits against the the unpaid judgment, we think paragraph 2(e) fairly expresses the agreement contemplated by the parties at the time of the trial, and that her attorney had authority to make such agreement. Further, her attorney had noticed that the judgment entered on August 19, 1980 was being tendered in advance, and, because he thought it fairly expressed the agreement of the parties, he made no objection to the judgment.

In these circumstances we find no reason to set aside any portion of paragraph 3(e).

5) Some complaint is made about obligations for attorney fees expressed in the judgment as entered, as not being included in the agreement at the time of trial. Obviously, the expression of attorney fees was contemplated by Mrs. Ott's attorney at the time he was authorized to speak for her. We find no reason to set aside this portion of the judgment. However, in no event, shall the obligation of Mrs. Ott "exceed the sum of $30,000."

Finally, we conclude that, in any event, were we to grant Mrs. Ott the relief she seeks ans set aside the judgment, she would be in default on her original guarantee in the sum of $30,000,

and plaintiffs would be entitled to a default judgment against her in this amount. The only thing Mrs. Ott gave up was a very slight possibility of recovery on a counterclaim, and she was not prepared to come to court and pursue this counterclaim in any event. There is no reason to grant Mrs. Ott any relief on this accord.

Finally, Mrs. Ott did not testify at this hearing. Her husband, Charles Ott, who caused all her difficulty, testified. No portion of his testimony, suggesting he was overreached by his counsel, Stuart Yussman and Fred Simon, is credible. We reject the claims of misrepresentation against these two attorneys as unfounded.

Therefore, the motion to set aside the final judgment in this case is overruled. This is a final order and there is no just reason for delay in its application.

/s/CHARLES M. LEIBSON, JUDGE
Date:

cc: Manley Feinberg
Stuart Yussman
Fred R. Simon
Edward A. Mayer
Asa H. Hoke
O. Grant Bruton

ENTERED IN COURT
OCT 28 1981
By PAULIE MILLER, Clerk
Deputy Clerk

EXHIBIT B

OPINION RENDERED: September 24, 1982;
10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 82-CA-359-MR

HERITAGE PRODUCTS, INC., CHARLES L. OTT AND SHARON OTT — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES M. LEIBSON, JUDGE
ACTION NO. 80-CI-01967

ED-LEE, INC., MUL'S, INC., H-S-H, INC. AND E. LEE HASENOUR — APPELLEES

AFFIRMING

* * * *

BEFORE: GUDGEL, LESTER and REYNOLDS, Judges

REYNOLDS, JUDGE. Heritge Products, Inc., Charles L. Ott and Sharon L. Ott, appeal the overruling of a motion to set aside an Agreed Judgment pursuant to CR 60.02. We affirm the judgment of the Jefferson Circuit Court.

On May 1, 1978, Heritage Products, Inc. purchased the assets of three restaurants known as Lums in Louisville, Kentucky. Leases for the

three premises were assigned to Heritage Products, Inc., and Heritage Products, Inc. executed two notes for the deferred portion of the purchase price in the total sum of $100,000.00. The notes were guaranteed by Charles L. Ott, President and sole shareholder of Heritage Products, Inc., and hs wife, Sharon, with Sharon's guarantee being limited to a total of $30,000.00

Heritage defaulted on payments, and suit was filed by appellees, Muls, Inc., holder of Heritage's $40,000.00 promissory note and assignor of the lease to the Brownsboro Road restaurant premises; H-S-H, Inc., holder of Heritage's $60,000.00 promissory note and assignor of leases to the Goldsmith Lane and Third Street premises; and Ed-Lee, Inc., lessor of the Goldsmith Lane premises. The Otts were joined by reason of their guaranties, and appellants' answer denied their indebtedness to appellees.

Appellants later counterclaimed alleging that the financial condition of the businesses had been misrepresented. Charles Ott deposed on April 14, 1980, that he had no basis for this claim and did not wish to pursue it. Sharon Ott deposed on April 24, 1980, that she knew nothing about any misrepresentations relating to the businesses.

The record reflects that when this case was called on for trial on July 31, 1980, Lee Hasenour and Manley Feinberg, attorney, were present on behalf of appellees, and Charles Ott and attorneys, Stuart Yussman and Fred Simon, were present on behalf of appellants. Sharon Ott was

on notice but did not appear. Instead, she chose to await her husband in Florida.

A settlement agreement was reached and dictated to the court reporter. Charles took the dictated settlement agreement to Sharon who refused to sign it. When defendants below failed to comply with payment terms by August 15, 1980, which would have resulted in partial forgiveness of the indebtedness, a more detailed formal Agreed Judgment was entered on August 19, 1980.

Appellants' motion to set aside this Agreed Judgment pursuant to CR 60.2 on grounds of fraud and surprise was overruled. Charles Ott testified at the CR 60.02 evidentiary hearing that the suit was "definitely settled" as to him and, therefore, Heritage. **See** Law and Fact Trial, p. 70. Sharon Ott is the only appellant entitled to demand relief from this judgment.

Appellant would have us reverse and remand this matter for a new trial on the following grounds:

(1) Sharon Ott's husband and attorneys did not have authority to bind her to the July 31, 1980, settlement agreement or the August 19, 1980, final Agreed Judgment;

(2) Sharon Ott's signature was a condition subsequent which, when she did not sign, voided the judgment;

(3) The final Agreed Judgment is not enforceable against her because it violates the statute of frauds, KRS 371.010; and

(4) Said final Agreed Judgment is void because its terms are materially altered from those intended by the parties as shown in the July 31, 1980, settlement agreement. We disagree, and affirm the holding of the circuit court.

CR 60.02 empowers the trial court, in its sound discretion, to relieve a party from a final judgment under certain extraordinary circumstances and upon such terms as it deems just. **Board of Trustees of Policeman's and Fireman's Retirement Fund v. Nuckolls**, Ky., 507 S.W.2d 183 (1974). The trial court's exercise of discretion will not be disturbed on appeal except for abuse. **Fortney v. Mahon**, Ky., 302 S.W.2d 842 (1957).

The record abounds with evidence that Mrs. Ott wanted no involvement with the difficulties into which her husband had gotten her. **See** T.E., p. 118. She was aware of the July 31, 1980, trial date but went to Florida to await her husband. Charles Ott stated that he had current authority on July 31, 1980, to act for his wife and to make the settlement agreement.

It is the duty of the litigant as well as her attorney to exercise reasonable foresight, prudence and diligence to prepare and to keep up with her case and to avoid surprises and misfortunes. **Workingmen's Perpetual Building and Loan Assn. v. Stephens**, 299 Ky. 177, 184 S.W.2d 575 (1944). No relief can be granted pursuant to 60.02 where an adverse judgment results from

neglect in defending one's case. **See Nuckolls, supra.**, p. 186.

If Mrs. Ott's husband and attorneys did not have authority to represent her in the settlement negotiations, the trial court could properly have entered a default judgment against her. If she had wished to appear and question Mr. Ott's authority or testify in her own defense, she was afforded a fair opportunity to do so. Pursuant to KRS 371.010, a writing signed by the authorized agent of the party to be charged therewith is sufficient for an action on the writing. The trial court properly held that Mrs. Ott's attorneys and husband had authority to enter into the settlement agreement on her behalf, and that Sharon was bound by the signature of her authorized agent, Charles, on the Agreed Judgment. **See** 50 C.J.S. **Judgments** §630 (1947).

Mrs. Ott argues that her refusal to sign the July 31, 1980, settlement agreement was a failure of a condition subsequent which voided the final August 19, 1980, judgment. The intent to create a condition subsequent must appeal expressly or by clear implication. 17A C.J.S. **Contracts** §339 (1947). A careful review of this record shows that the parties' purpose in requiring Mrs. Ott's signature was to guarantee the notes which were to be extended in the event a payment was made by August 15, as well as deprive her of personal defenses under the extended notes. **See** T.E., pp.20-21, July 21, 1982, Agreement, P. 3; August 19, 1980, Final

Judgment, p. 4, clause F. We find no evidence of intent to create a condition subsequent.

Appellant's argument that the August 19, 1980, Final Judgment is void because it materially differs from the July 31, 1980, negotiated settlement is without foundation.

Paragraph 3E of the August 19, 1980, Final Judgment states that Sharon is not to receive credit for the sale of personal property located at the Brownsboro Road or Third Street Premises. Mrs. Ott's May 1, 1978, guaranty expressed her intent to guarantee "payment of the full amount of both notes in the total sum of $100,000.00" although her liability was limited to $30,000.00.

Appellant asserts that the Agreed Judgment's requirement that she pay reasonable attorney fees was not intended by the parties at the time they negotiated. A cursory review of her May 1, 1978, guaranty reveals Mrs. Ott's intent to be liable for "all expenses, **including attorney fees**, incurred . . . in connection with . . . the collection thereof." Clearly the Otts' liability for attorney fees has been contemplated by the parties from the outset.

Appellant argues that the $16,854.05 materially differs from the $16,500.00 negotiated pursuant to Paragraph 5 of the settlement agreement. Reference to the first full paragraph of the final page of the July 31, agreement clari-

fies that the estimated amount of $16,500.00 to be paid for tax arrearages is actually $16,854.05.

Appellant's argument that the clause addressing parties' rights under a May 1, 1980, security agreement/financing statement is not buttressed by the record which is devoid of said statement. Since the Otts did not meet the conditions precedent set out in Paragraph 5 of the August 19, 1980, judgment, this clause never became an effective part of the Judgment.

The decision of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

ATTORNEYS FOR APPELLANTS:

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Germantown, Tennessee 38138

O. Grant Bruton
Middleton & Reutlinger
501 South Second Street
Louisville, Kentucky 40202

ATTORNEY FOR APPELLES:

Manley N. Feinberg
231 South Fifth Street
Louisville, Kentucky 40202

EXHIBIT C

SUPREME COURT OF KENTUCKY

FILE NO._____

HERITAGE PRODUCTS, INC., CHARLES L. OTT and SHARON OTT — MOVANTS

V.

MOTION FOR DISCRETIONARY REVIEW OF THE COURT OF APPEALS DECISION IN NO. 82-CA-359-MR

ED-LEE, INC., MUL'S INC., H-S-H, INC. and E. LEE HASENOUR — RESPONDENTS

* * *

Come Movants, HERITAGE PRODUCTS INC., CHARLES L. OTT and SHARON OTT, by counsel, and move this Honorable Court for a discretionary review of certain portions of the decision of the Court of Appeals in No. 82-CA-359-MR, styled Heritage Products Inc., Charles L. Ott and Sharon Ott, Appellants vs. Ed-Lee, Inc., Mul's Inc., H-S-H Inc. and E. Lee Hasenour, Appellees. In support hereof, and pursuant to CR 76.20, the following is submitted.

1. The Movants are HERITAGE PRODUCTS INC., CHARLES L. OTT and SHARON OTT, and their counsel are: Asa H. Hoke, 2136 Exeter Road, Suite 203, Germantown, Tennessee 38138 and O. Grant Bruton, Middleton and Reutlinger, 501

South Second Street, Louisville, Kentucky 40202; The Respondents are ED-LEE INC., MUL'S INC., H-S-H INC. and E. LEE HASENOUR, and their counsel is Manley N. Feinberg, 231 South Fifth, Louisville, Kentucky 40202.

2. The Opinion of the Court of Appeals was dated September 24, 1982.

3. No supersedeas bond has been executed.

4. The facts, briefly stated, show that the Movants defaulted on payment of notes in the total sum of $100,000.00, payable to the Respondents. Suit was filed by Respondents and the case was called for trial on July 31, 1980. All parties were present, except Sharon Ott, who was on notice but was in Florida. A settlement agreement was reached which Sharon Ott subsequently refused to sign. No remedial action was taken by the Movant's attorney, Fred Simon, after he was informed that Mrs. Ott would not sign the agreement, and the "Agreed Judgment" was filed without Mrs. Ott's signature on August 19, 1980. The Agreement which was filed not only lacked the signature of one of the parties, but it also was materially different from the agreement which was reached on July 31, 1980.

Movants entered a Motion to Set Aside the Agreed Judgment on the grounds of fraud and surprise, which the Court denied. Movant appealed the overruling of this Motion on the grounds that:

a. Mr. Ott and Mrs. Ott's attorneys did not have the authority to bind her to either agreement;

b. Mrs. Ott's signature was a condition subsequent which, when she would not sign, voided the judgment;

c. The final agreement violates the Statute of frauds, KRS 371.010; and

d. The terms of the final agreement were materially altered fromthose intended by the parties.

The Court of Appeals affirmed the decision of the Trial Court, and held that the above contentions were groundless.

Movant believes the Court of Appeals erred in not recognizing that the attempted settlement agreement constituted a contract to which Mrs. Ott did not assent. The offer was made by Respondents, but subsequently rejected by one of the parties to the contract. The Court of Appeals held, and Movants believe wrongly so, that Mrs. Ott's husband and their attorneys had the power to bind her to the contract. Even if this principle were sound, the agreement which was filed on August 19, 1980, was materially altered in regard to paragraph 3(e) and these alterations were not reflective of the parties' intentions when the contract ws formed. Simply put, the agreement which was filed was never accepted by Movants and the Court of Appeals' "reading in" of the Movants intentions is clearly in error.

The Court of Appeals erred in finding that the agreed judgment entered on August 19, 1980

was simply a more detailed statement of the terms of the dictated settlement agreement dated July 31, 1980.

The Court of Appeals completely failed to address Appellants' argument that appellants' counsel at the trial level failed to represent the interests of Mrs. Ott. Notwithstanding the fact that appellants' trial counsel knew that Mrs. Ott had not signed the agreed judgment and, in fact, did not assent to the terms of the agreed judgment, they nonetheless entered the agreement with the court. Said trial counsels had a duty to represent Charles and Sharon Ott jointly and individualy. Any settlement had to be approved by her in order to bind her own funds. In regard to settling similar claims of clients, Disciplinary Rule 5-106 (A) of the **Code of Professional Responsibility** states as follows:

> A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement on the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

Therefore, the Ott's attorneys had a responsibility to act in the best interest of Mrs. Ott

individually as well as jointly with Charles Ott. However, said attorney's failed to advise her regarding the settlement, instead allowing Charles Ott, a co-defendant to alone consult with her. Appellant's attorneys should have consulted with Sharon Ott themselves, and by not doing so, are guilty of inadequate representation.

Therefore, due to inadequate representation by her trial level attorneys, Mrs. Ott has been denied her day in court, and no matter how slight the possibility of recovery on the counterclaim might have been, she deserved to be heard. If this action had continued to trial in the court below, ther may have been no need for this appeal, and Appellant may not have suffered continuous and irreparable harm from loss of business, personnel, and inability to meet previously incurred bills and expenses as well as those ongoing.

5. Pursuant to CR 76.20 (3) (e) and CR 76.20 (4), attached hereto and filed herewith are photocopies of following.

a. The Opinion of the Court of Appeals dated September 24, 1982;

b. The Judgment of the trial court and the Agreed Judgment dated August 19, 1980;

c. The trial court's Findings of Fact and Conclusions of Law dated October 28, 1981.

6. Movants do not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

7. No other party to this proceeding has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

/s/_____
ASA H. HOKE
2136 Exeter Road, Suite 203
Germantown, Tennessee 38138
(901) 755-1303

/s/_____
O. GRANT BRUTON
Middleton and Reutlinger
501 South Second Street
Louisville, Kentucky 40202

COUNSEL FOR MOVANTS

CERTIFICATE OF SERVICE

It is hereby certified, pursuant to CR 76.20 (7), that copies of the foregoing Motion were served upon the following persons, at his last know address on this October 13, 1982: Manley N. Feinberg, 213 South Fifth, Louisville, Kentucky 40202., Counsel for Respondent, and Hon. John C. Scott, Clerk of the Court of Appeals, 403 Wapping Street, Frankfort, Kentucky 40601.

/s/_____
ASA H. HOKE

EXHIBIT D

SUPREME COURT OF KENTUCKY

82-SC-845-D
(82-CA-359-MR)

HERITAGE PRODUCTS, INC.,
CHARLES L. OTT & SHARON OTT MOVANTS

V. JEFFERSON CIRCUIT COURT
#80-CI-01967

ED-LEE, INC., MUL'S INC.,
H-S-H, INC. & E. LEE
HASENOUR RESPONDENTS

ORDER DENYING MOTION FOR
DISCRETIONARY REVIEW

The motion of Heritage Products, Inc., Charles L. Ott and Sharon Ott for a review of the decision of the Court of Appeals is denied.

ENTERED December 7, 1982.

/s/_____
Robert F. Stephens
Chief Justice